

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Amendments to Rules of Practice

Docket No. RM2019-13

PUBLIC REPRESENTATIVE REPLY COMMENTS

(November 15, 2019)

I. INTRODUCTION

Pursuant to the Commission's September 13, 2019 order establishing this rulemaking docket,¹ the Public Representative hereby files Reply Comments in response to the November 1, 2019 comments of the United States Postal Service² and the Association for Postal Commerce ("Post Com") and The Association of Magazine Media ("MPA") (collectively, "PostCom/MPA").³

The Commission established this docket to reorganize the order of appearance of its regulations and to revise rules for on the record proceedings in Chapter III of title 39 of the Code of Federal Regulations (CFR). Order No. 5229 at 1.

¹ Notice of Proposed Rulemaking to Amend the Commission's Rules of Practice and Procedure and to Reorganize its Regulations in the Code of Federal Regulations, September 13, 2019, (Order No. 5229).

² Comments of the United States Postal Service in Response to the Proposed Rules in Order No. 5229, November 1, 2019 (Postal Service Comments).

³ Comments of the Association for Postal Commerce and MPA – The Association of Magazine Media, November 1, 2019 (PostCom/MPA Comments).

II. REPLY TO COMMENTS OF THE POSTAL SERVICE

A. Designation of Presiding Officers

The Postal Service proposes to add a sentence at the end of proposed section 3010.106(a) regarding the designation of presiding officers. Postal Service Comments at 3. The Commission's proposal would permit the designation of presiding officers to be members of the Commission, any member of the Commission's staff, an Administrative Law Judge employed by the Commission for a specific proceeding, or "any person under contract with the Commission." Order No. 5229 at 88. The Commission's current rule does not provide for designation of "any person under contract with the Commission." See section 3001.5(e).

The Postal Service suggests adding a requirement at the end of proposed section 3010.106(a) that, "any presiding officer must be a federal employee subject to applicable federal rules of ethical conduct." The Postal Service argues this "is important to ensure that any such designated presiding officer is at a minimum a federal employee and is subject to the applicable federal rules of ethical conduct" to help avoid a conflict of interest in cases over which the designee is assigned. Postal Service Comments at 4.

Simply eliminating contractors from the mix of potential presiding officers would resolve the issue raised by the Postal Service. However, that would nullify the potential advantages of designating contractors as presiding officers. It may be desirable in the Commission's discretion to retain the flexibility of engaging contractors to act as presiding officers.

To be subject to federal ethical standards, a contractor is not required to be a federal employee. Contractors can be subject to ethical standards in two ways. The Commission's contracts with contractors can include provisions prohibiting conflicts of interest whereby contractor warrants there is no conflict of interest, as well as provisions prohibiting bribes, corrupt or fraudulent practices and other relevant clauses in the execution of the contract. Alternatively, a contractor may be designated a Special

Government Employee (SGE) who is subject to the federal government's ethical standards.

A summary of the ethical requirements applicable to SGEs by the federal Office of Government Ethics (OGE) specifically addresses this issue.⁴ The OGE is an independent agency responsible for directing executive branch policies relating to the prevention of conflict of interest on the part of Federal executive branch officers and employees. It states that while independent contractors are not deemed government employees, *id* at 3, a contractor can be a federal employee for certain purposes if designated as an SGE by the contracting entity. *Id.* at 1. An SGE is defined as “an officer or employee ...who is retained, designated, appointed or employed” by the Government to perform temporary duties....” *Id.* SGEs are government employees for purposes of the conflict of interest law. Yet, “SGEs are subject to less restrictive conflict of interest requirements than regular employees, but are subject to more restrictive requirements than non-employees, who generally are not covered by the conflict of interest laws at all.” *Id.* The determination of SGE status must be made at the time the individual is retained. *Id.* at 3.

A drawback of the SGE rules is that it generally limits, with some exceptions, appointments for not more than 130 days during any period of 365 consecutive days. *Id.* at 1.

If the Commission chooses to retain the option of contracting for presiding officers, the Public Representative proposes deleting the employee requirement proposed by PostCom/MPA and inserting language that the contractor shall be subject to conflict of interest laws or may be a Special Government Employee.

⁴ Conflict of Interest and the Special Government Employee, A Summary of Ethical Requirements Applicable to SGEs, Office of Government Ethics (OGE Summary) available at <https://ethics.od.nih.gov/topics/OGE-SGE.pdf>

III. REPLIES TO COMMENTS OF POSTCOM/MPA

A. *Ex Parte* Communications

PostCom/MPA argues that for notice and comment proceedings the Commission should *expressly* adopt the “permit but disclose” approach to *ex parte* communications. As PostCom/MPA explains, its argument to include specific language in the rule was rejected by the Commission when the *ex parte* rules were revised in Docket No. RM2016-4 in 2016.⁵ PostCom/MPA Comments at 2. PostCom/MPA’s proposed language is also beyond the scope of this proceeding which does not intend to modify this section of the rules. Most importantly, a close reading of the current *ex parte* rules indicates that they actually provide for the result that PostCom/MPA requests. Rule 3008.7(a) already indicates that the penalties for *ex parte* communications do not apply to notice and comment proceedings. PostCom/MPA acknowledges the Commission stated in Order No. 3379 that the rule effectively adopted the “permit but disclose” approach for *ex parte* communications. PostCom/MPA Comments at 3. Explicitly stating in the rule that it does not apply to notice and comment proceedings is unnecessary.

B. Motions to Strike

PostCom/MPA requests the Commission to limit the applicability of proposed section 3010.164 Motions to strike (derived from current section 3001.21(c)) by removing it from that part of the proposed rules “generally applicable to all proceedings.” Order No. 5229 at 115. PostCom/MPA would limit the section’s applicability to on the record proceedings where material may be stricken from the record. PostCom/MPA Comments at 4. Post Com/MPA argues that if the proceeding involved is a notice and comment proceeding, “[r]ather than strike comments from the record” the Commission would

⁵ Docket No. RM2016-4, Order Adopting Final Rules for Ex Parte Communications, June 22, 2016 (Order No. 3379).

simply decline to consider such statements as being non-relevant and/or outside the scope of the proceeding. *Id.*, citing Order No. 4871 at 5.⁶

PostCom/MPA miscomprehends the proposed new rule. On its face, the rule is not limited to the striking of material from the record. Section 3010.164(a) of the proposed rule applies to motions that may request material to be “stricken from *consideration*” and section 3010.164(b) of the rule requires justification why material should be “stricken from *consideration*.” (Emphasis added.) Granting such a motion would only determine that certain material will not be considered. Having reached the conclusion to strike from *consideration*, in an on the record proceeding the Commission may strike material from the record, and in a notice and comment proceeding, the Commission may deem material to be non-relevant or outside the scope of the proceeding. Thus, the proposed rule applies to either type of proceeding.

C. Clarification of Rule Regarding Petitions to Initiate Proceeding

PostCom/MPA is concerned that proposed rule 3010.201(b)(2) does not adequately provide for Commission rejection of petitions committed to the agency’s discretion. PostCom/MPA Comments at 4-7. It points out that the proposed rule appears to apply only to petitions deemed frivolous or duplicative but not otherwise. Order No. 5229 at 118. The Public Representative agrees with the PostCom/MPA comment. The Public Representative therefore proposes revision of the second sentence of section 3010.201(b)(2) to read:

The Commission in its discretion may reject petitions that are either frivolous or duplicative of other Commission efforts or otherwise, or defer for future consideration ~~otherwise~~ meritorious petitions that have not demonstrated the potential for an immediate impact on the affected person.

⁶ Docket No. RM2018-1, Order Denying Motion to Strike, November 2, 2018 (Order No. 4871).

PostCom/MPA also requests clarification on whether Commission deferral of action on a petition results in a final appealable order. PostCom/MPA Comments at 6. Generally, Commission deferral of petitions would not result in a final appealable order, but that could depend upon the circumstances. The Commission may not wish to limit its future flexibility with a rule that states deferrals are not final. Relevant is current rule 3001.44, copied below, providing for Commission closing of inactive dockets where there has been no activity within the prior twelve months.

3001.44 Automatic Closure of Inactive Docket.

(a) The Commission shall automatically close a docket in which there has been no activity of record by any interested person for 12 consecutive months, except those dockets in which the Commission must issue a final determination by rule or statute, or if the Commission has otherwise indicated a final order is forthcoming in the docket and has yet to do so.

(b) Each month the Commission shall post on the Web site a list of dockets that will be subject to automatic closure in the following month and will include the date on which the docket will automatically close.

This rule assists petitioners in determining when the Commission's deferral action is final.

IV. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

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